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THE REFORMATION OF WRITINGS UNDER THE LAW OF NORTH CAROLINA

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From the time people first began making agreements they have called on the courts to correct their mistakes and readjust them in their contract relationship. The reforming of writings has long been an integral part of the equity jurisdiction of the North Carolina courts. When the supreme court heard the first petition for relief of this nature the North Carolina Reports were in only their third volume.[1] Since then it has reviewed about two hundred such controversies involving nearly every variety of written instruments. The province of reformation is relatively simple when stated from the viewpoint of doctrine rather than practical administration. The court will correct any instrument, executory or executed, which fails to express the agreement of the parties accurately.[2] The ground of its jurisdiction is the unconscionable situation that obtains whenever the original agreement is not in accord with its written expression. So long as the inaccurate writing stands, it alone constitutes the legal contract between the parties. For this reason reformation is necessary if the real wishes of the contractors are to prevail. The court does not seek to give the parties a better bargain than they themselves made, but places in the writing only what they intended should be there.

In order to understand the proper limits of reformation it must be remembered that there are usually two stages in the transaction which leads up to a written contract. First, there is the approach of the parties to each other and the elaborate negotiations ending in a bargain. Each contractor during the course of these negotiations has in mind certain reasons which prompt him to demand concessions, compromise, or yield to the wishes of the other. He defines his bargain solely with reference to those facts he sees at the time. One or both the parties may understand the situation surrounding them only imperfectly or not at all. For this reason every contract embodies the germs of future dispute and is pregnant with latent ambiguities which become resolved only when the contractors have ceased to look solely to the success of their venture and realize that their interests are antagonistic. During the first early stage of the transaction there is every opportunity for mistake or fraud. To care for this the court has developed doc-

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[1] Huson's Adm'rs v. Pitman, 3 N. C. 331 (2 Hay) (1804).

[2] A catalogue of representative instances of reformation appears in the Appendix. This is by no means exhaustive.

trines appropriate to the need: rescission, restitution, the constructive trust and the action at law for fraud and deceit.[3]

Reformation does not fall within the above category of remedies. It is reserved exclusively for those conflicts arising in the second stage of the transaction. After the contractors believe they have definitely prescribed the terms and limits of their bargain they undertake to reduce it to written form. This may be attempted by one of the parties or some third person such as an attorney. Through forgetfulness, lack of understanding, misinformation, or even fraud, the draftsman may produce a document which does not conform to the bargain. When this has happened the instrument will be reformed by the court.[4] If, however, the document is in accord with the original understanding of the parties the court cannot correct it, irrespective of how unfortunate may be the bargain it represents; for to do so would involve the creation of a legal agreement to which one party would be bound against his will.[5]

[3] References on the general topic of relief for mistake which will be found useful include: 3 WILLISTON, CONTRACTS (1920) §§1535-1600; Abbot, *Mistake of Fact as Ground for Affirmative Equitable Relief* (1910) 23 HARV. L. REV. 608; Foulke, *Mistake in the Formation and Performance of a Contract* (1911) 11 COL. L. REV. 197, 299; Patterson, *Equitable Relief for Unilateral Mistake* (1928) 28 COL. L. REV. 859.

[4] The effect of reformation is a relation back to the time of the execution of the writing. Thus, in the case of Torrey v. McFadyen, 165 N. C. 237, 81 S. E. 296 (1914) plaintiff had defaulted one week under a contract to purchase land which had been mistakenly transcribed as an option. It was held that the effect of reforming the instrument was to prevent time from being of the essence and to entitle plaintiff to restitution of money paid by him when defendant sold the land after said default. Also see, Sheets v. Stradford, 200 N. C. 36, 156 S. E. 144 (1930). This policy of relation back may be disregarded where the purpose for which reformation is sought is not a proper one. Where plaintiff wanted a deed corrected solely to enable him to add color of title to his adverse possession and thus shorten the statutory period, equity refused to lend its aid. Cedar Works v. Roper Lumber Co., 168 N. C. 391, 84 S. E. 521 (1915).

[5] On at least two occasions the court has corrected writings under circumstances appearing to be outside the limits above set forth. Both cases, however, are easily accounted for. The first of these is the case of Burleson v. Stewart, 180 N. C. 584, 105 S. E. 182 (1920). Plaintiff conveyed property to *X*, reserving a life estate for himself and defendant, whom he believed was his wife. On discovering that his marriage was bigamous and defendant had a living husband by a prior marriage he sought to exclude her from the conveyance. The court granted relief and struck the wife's name from the reservation in the deed. The remedy here might be designated either as partial rescission or a constructive trust. Under either view the correction of the deed was proper, since it was necessary in order to complete the relief. In the case of Lamm v. Lamm, 163 N. C. 71, 79, S. E. 290 (1913), the situation was similar. Matthew purchased property from Taylor. He was fraudulently induced by his wife, Florence, to have the conveyance made to her. After Matthew's death his heirs sought to enforce a constructive trust in their favor. The court granted relief and made a final disposition of the case by striking the name of the grantee from the deed and substituting the complainants' in place thereof. In neither of the above cases was reformation involved except as ancillary to the principal relief granted. Neither are true cases of reformation, because the writings contained precisely what it was intended they should.

From the above it will be seen that there can be no standard for correction until the court has fixed the precise terms of the original bargain. It must take great pains to distinguish these from the complainant's version of what he wishes he had agreed to or thinks he did. The administrative task here is extremely delicate and calls for every facilitating device the law can afford. Yet the court has enlisted only a bare handful of doctrines and a few well settled rules of evidence. This spareness of its equipment is a matter of necessity, for a court can employ definite rules to advantage only in those situations which are subject to detailed classification in advance and which call into play some crystallized legal policy or some ascertainable element of "fault." These situations are not commonly embraced within the field of reformation, and the court must meet the more delicate problem by stripping its machinery down to barest running gear. It must abandon definite rules in favor of a resort to broad principles. The result is a resolution of sharp conflicts between abstruse social and economic policies through the medium of a few loosely established guides.

Five leading principles are employed by the court in granting or refusing reformation. They may be broadly stated as follows:

(1) Reformation will not be granted except on clear and convincing evidence.

(2) Reformation will be granted only when the mistake is *mutual.*

(3) Reformation will not be granted for a mistake of law standing alone.

(4) Reformation will not be granted for a mistake attributable to the negligence of the complainant.

(5) Reformation will not be granted when the complainant had a fair opportunity to read the instrument before signing or accepting it.

Of course there are other limits to the exercise of the court's power to reform. But in most instances where it has denied relief it has explained its position in terms of one or more of the above principles. Hence a study of reformation will naturally resolve itself largely into a consideration of these factors. How important is their function in that large body of reasons which motivate the court to decide a particular case in a given way? Are they self-sufficient causes of judgment? Are they *predictions* in the sense that an attorney can apply them beforehand to the raw material of his evidence and so give his client some reasonable assurance that relief will or will not be forthcoming? If their value as predictions is negligible, do they perhaps serve some other useful purpose in the decision of reformation cases?

THE REQUIREMENT OF CLEAR AND CONVINCING EVIDENCE

It was pointed out in an earlier paragraph that reformation is available only when the written instrument fails to conform to the bargain it was intended to express. If the relief sought is against a mistake occurring in the first stage heretofore referred to, it must be granted through other branches of equity's jurisdiction. It follows that the court in reformation proceedings must not only discover the error but must also take care to establish the relationship between the error and the transaction. This latter cannot be done until the court has fixed the terms of the bargain with a high degree of precision. Only when it is satisfied that these terms do not comport with those contained in the writing can it feel free to make the desired correction. This task is made all the more difficult by the indefinite and conflicting testimony of the parties. Each litigant enters the court room with his own version of the negotiations, and his statements are likely to be colored by his appreciation of intervening difficulties. He sees the bargain as he would now like it, rather than as it really was. At the time of the transaction both looked only to the success of the venture and neither legalistically distinguished the agreement itself from the maze of tacit understandings and half-expressed wishes surrounding the bargain. Perhaps they agreed only on the general purpose to be effected by their contract and they either failed to consider the details or altered them from time to time. However distinct in theory the two stages of the transaction may be, it is often almost impossible to distinguish them in practice. The burden of producing intelligible evidence to upset the writing is on the complainant. If the court feels that it cannot unravel the transaction into its component parts, it must leave the parties as they are. In such case it may explain its decision by saying that the complainant has failed to establish his case by clear and convincing evidence.[6] This requirement of the proof is one of the most useful

[6] Equity will reform only on evidence which is clear and convincing: Williams v. Greensboro Fire Ins. Co., 209 N. C. 765, 185 S. E. 21 (1936); Life Ins. Co. of Va. v. Edgerton, 206 N. C. 402, 174 S. E. 96 (1934); Burton v. Life & Casualty Ins. Co., 198 N. C. 498, 152 S. E. 396 (1930); Lloyd v. Speight, 195 N. C. 179, 141 S. E. 574 (1928); Ricks v. Brooks, 179 N. C. 204, 102 S. E. 207 (1920); American Potato Co. v. Jennette Bros. Co., 174 N. C. 236, 93 S. E. 795 (1917); Johnson v. Johnson, 172 N. C. 530, 90 S. E. 516 (1916); Clements v. Life Ins. Co. of Virginia, 155 N. C. 57, 70 S. E. 1076 (1911); King v. Hobbs, 139 N. C. 170, 51 S. E. 911 (1905); Giles v. Hunter, 103 N. C. 194, 9 S. E. 549 (1889); Ely v. Early, 94 N. C. 1 (1886); Chamness v. Crutchfield, 37 N. C. 148 (2 Ire. Eq.) (1842); Harrison v. Howard, 36 N. C. 407 (1 Ire. Eq.) (1841). It has been held that the requirement is not a "sacramental phrase" and any language conveying the same idea will be sufficient, McRae v. Fox, 185 N. C. 343, 117 S. E. 396 (1923).

The court has differentiated between the degree of evidence required for reformation and that required to rescind a transaction or establish a constructive trust. In the latter forms of relief a mere preponderance of the testimony is suf-

expedients available to the court, because it expresses many subtle factors which militate against relief, in a language thoroughly acceptable to lawyers. It enables the court to give comfortable articulation to its vague feeling of dissatisfaction with the status of the case presented. Unlike many equitable generalities, it offers no false doctrine couched in ambiguous phrases to trap the attorney in future litigation. It not only offers a plausible ground on which the refusal of relief may be explained, but likewise fixes the attitude of the court toward its problem by expressing in advance the relative sanctity with which the law regards written contracts seriously entered into. As a device to aid in prediction, it warns the attorney that he must produce a good stock of intelligible testimony to show the precise terms of the original bargain if the court is to be moved to action.

The usefulness of the requirement of clear and convincing evidence has been considerably impaired in this state by the interjection of the jury trial in actions for reformation. Although the requirement still obtains, yet the weight to be given the testimony has been held solely for the jury. If there is more than a "scintilla" of evidence, a failure to submit the issue of reformation to the jury is reversible error.[7] The mechanics of framing issues and appropriate instructions offer their own difficulties.[8] The jury must be instructed that the evidence shall be clear and convincing as to each issue presented.[9] The intervention of the jury is not believed to have appreciably increased those instances wherein relief is awarded without real cause. However, the fact that the requirement of clear and convincing evidence is no longer available to bear the brunt of explaining conclusions has had unfortunate consequences. It has forced the court to overburden the less felicitous doctrine requiring mutuality of mistake as a prerequisite to relief.

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ficient. See the discussion in the following cases: Harding v. Long, 103 N. C. 1, 9 S. E. 445 (1889); Lamm v. Lamm, 163 N. C. 71, 79 S. E. 290 (1913); Long v. U. S. Fidelity & Guaranty Co., 178 N. C. 503, 101 S. E. 11 (1919).

[7] Sills v. Ford, 171 N. C. 733, 88 S. E. 636 (1916); Highsmith v. Page, 158 N. C. 226, 230, 73 S. E. 998 (1912); Grey v. James, 151 N. C. 80, 82, 65 S. E. 644 (1909); Cuthbertson v. Morgan, 149 N. C. 72, 76, 62 S. E. 744 (1908); Lehew v. Hewitt, 130 N. C. 22, 40 S. E. 769 (1902); rehearing, 138 N. C. 6, 50 S. E. 459 (1905).

[8] Although reformation may be granted without a specific prayer for relief, yet there must appear in the complaint such facts as will warrant an issue of reformation being submitted to the jury. This would be true, of course, even though the facts were tried by the court alone. Burton v. Life & Casualty Ins. Co., 198 N. C. 498, 152 S. E. 396 (1930); Webb v. Borden, 145 N. C. 188, 58 S. E. 1083 (1907); Buchanan v. Harrington, 141 N. C. 39, 53 S. E. 478 (1906). Complainant need not bring an affirmative action for reformation, since relief is available by way of defense or counterclaim. Cuthbertson v. Morgan, 149 N. C. 72, 62 S. E. 744 (1908); Lamb v. McPhail, 126 N. C. 218, 35 S. E. 426 (1900). A decree of reformation, in appropriate instances, may be supplemented by a money judgment. Gillis v. Arringdale, 135 N. C. 295, 47 S. E. 429 (1904).

[9] Hubbard & Co. v. Horne, 203 N. C. 205, 165 S. E. 347 (1932).

THE REQUIREMENT OF MUTUALITY OF MISTAKE

The ground of equity's jurisdiction in reformation is the necessity of relieving an unjust condition which obtains whenever parties dscover what the agreement they made and intended to incorporate in a writing does not appear therein. The court must either intervene or suffer one of the parties to be bound by a written instrument containing no contract of his own. When this state of affairs appears its inequity is apparent, and alone calls for action without being further colored by any showing of mistake. The court is asked to relieve a condition, not a state of mind. Of course the absence of conformity between the agreement and the writing is not apparent at the outset. It can be revealed only by evidence of all the circumstances of the transaction, and the litigants making this showing are almost certain to bring to light a mistake by someone. This mistake is usually said to be the cause of the unfortunate condition. But the court cannot remove the cause; it can only relieve the parties from the effect. Although the existence of a mistake is normally a feature closely attendant on the condition that gives rise to the right to reformation, it is not the condition itself. Nevertheless, the close relationship between the existence of the mistake and the existence of an inequitable situation has led the court into talking of reformation in terms of mutuality of mistake. It is often said that an instrument will be reformed only for mutual mistake of the parties, mistake of the scrivener, or mistake of one party coupled with fraud on the part of the other.[10] The meaning of this language is not at all clear. In the first place, no uncontroverted definition of mistake has ever been formulated. A mistake has been defined severally as a state of mind,[11] an act,[12] and a composite of both mental state and act.[13] Hence the inquiry is always subject to the par-

[10] See, for example, cases cited in notes 16, 17, 18, and 19, *infra*. Almost any North Carolina case dealing with reformation will be found to contain some reference to this requirement.

[11] "Within these rules, a mistake is an erroneous conviction arising in the mind of a party through ignorance, inadvertence, or forgetfulness, or as a result of an error in computation, or a genuine but unfounded belief as to the existence or non-existence of a particular fact." 1 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) §127. It is interesting to note that in the same section the learned writer excludes mistakes of judgment from his definition, citing Brown Bros. Mfg. Co. v. S. H. Harris & Co., 185 Ill. App. 568 (1914).

[12] "The conception of a mistake involves, in the first place, the idea of action, as mistake can never be predicated of a state of mind. The individual who never does anything never makes a mistake, unless it could be said that he makes a mistake in life by never doing anything. A mistake, therefore, consists in doing something; it consists in doing something which, it afterwards turns out, is wrong." Ronald R. Foulke, *Mistake in the Formation and Performance of a Contract* (1911) 11 COL. L. REV. 197, 199. See also, 1 STORY, EQUITY JURISPRUDENCE (13th ed. 1886) §108.

[13] "Of course a state of mind produces no legal consequences unless some act capable of legal consequences takes place concurrently with the state of mind,

ticular court's conception of the object of search, and this conception is seldom clearly formulated. Such indiscrimination is far more pronounced when the required attribute of mutuality is appended. Do we mean that the parties must *think alike,* that they must *act alike* or that they must both *think and act alike?* If by the term, mistake, we mean only an act, it must follow that when only one party has acted, he alone can be mistaken, unless the other has adopted his conduct and made himself an actor thereby. Thus, if one of the contractors undertook alone to reduce the agreement to writing and in doing so made an error in favor of the other, he is likely to be left without a remedy.[14] If, on the other hand, all the parties must *think alike* to satisfy the requirement, we shall encounter even greater difficulty in administering relief. It will then be incumbent on the petitioner to prove the secret and internal accord of the other if he is to have reformation. In a previous article the author has attempted to demonstrate the doctrinal fallacies inherent in the requirement of mutuality of mistake as a prerequisite to reformation.[15]

Whatever purpose the doctrine may serve, at least it is apparent that it can have little significance for the attorney until it has been authoritatively translated by the court. In the case of *Dameron v. Lumber Co.* the court said:

"A deed cannot be corrected or reformed because of the mistake of one of the parties to it, but only when the mistake is mutual, that is, the mistake of both parties, or else upon the mistake of one party brought about by the fraud of the other. . . ."[16]

Again, in the case of *Allen v. Roanoke Railroad & Lumber Co.* it was said:

"The power of a court of equity to reform written instruments so as speak the real contract of the parties will not be exercised because of the mistake of one of the parties unless brought about by the fraud of the other; but an instrument will be reformed when the mistake is by all parties or when it is the mistake of the draftsman."[17]

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and this is the only accurate meaning which can be attached to the statement often made that mistake as such has no legal effect; but what the effect of the act would be apart from the mental error, and whether this effect is changed because of that error, are two questions which must be separately considered. The subject of mistake properly includes only the second of these questions and involves the effect of erroneous ideas upon legal acts, or upon acts which would have been legal acts had it not been for the error." 3 WILLISTON, CONTRACTS (1920) §1535.

[14] This conception of the nature of a mistake apparently underlies the court's reasoning in Britton v. Metropolitan Ins. Co., 165 N. C. 149, 80 S. E. 1072 (1914). Compare New York Life Ins. Co. v. Kimball, 93 Vt. 147, 106 Atl. 676 (1919).

[15] Malone, *The Reformation of Writings for Mutual Mistake of Fact* (1936) 24 GEORGETOWN L. J. 613.

[16] 161 N. C. 495, 498, 77 S. E. 694, 695 (1913).

[17] 171 N. C. 339, 342, 88 S. E. 492, 494 (1916). See also, Wilson v. Scarboro, 163 N. C. 380, 79 S. E. 811 (1913).

The above statements, selected at random, are typical of the indefinite language employed by the court. There is no effort to define what is meant by the word, mistake. All we are told is that both parties must be mistaken, not just one of them. Nor does the court indicate which of the many potential errors in the transaction must be shared by both parties. Thus, not only does the court fail to remove the ambiguity which beclouds the term itself, but likewise it fails to point out the all-important relationship which the mistake should bear to the transaction.

Perhaps the statement that equity will not reform a writing unless the mistake is mutual means simply that there must have been a mutual agreement concerning the disputed term or terms and a failure of this agreement to find adequate expression in the writing. If this is true, the doctrine resolves itself into merely one of the many shorthand expressions in which equity abounds. Such a conclusion finds ample support in the language employed by the court in several decisions. For example, in the case of *Finishing and Warehouse Co. v. Ozment* the court said:

". . . The law always presumes, nothing else appearing, that a deed has been correctly written, and that it is the true expression of the intention and agreement of the parties, and it must stand . . . unless this presumption of the law is in some way rebutted in an action brought to reform the deed, the burden being upon him who seeks to correct it to show by strong and convincing proof . . . that there was a mutual mistake, and that the alleged intention of the parties, to which he desires it to be conformed, continued concurrently in the minds of both of them down to the time of its execution, and he must also show precisely the form to which the deed ought to be brought."[18]

In the case of *Maxwell v. Wayne National Bank* the following language was used:

"To ascertain whether a mistake has been made in describing property in a deed, it is essential to know the intent of the parties, the one in selling and the other in buying, respecting the subject-matter of the conveyance; and if the deed fails to express their intention, there is a mutual mistake, relievable in equity by way of reformation, where the proof is clear, convincing and satisfactory."[19]

Immediately the question arises: if the fundamental idea underlying the doctrine is capable of such lucid expression as the above, why is it so frequently garbed in the cryptic language of mutual mistake? Why does the court employ so noncommunicative a statement? Surely the simple desire to abbreviate does not fully justify the confusion which

[18] 132 N. C. 839, 845, 44 S. E. 681, 683 (1903).

[19] 175 N. C. 180, 183, 95 S. E. 147, 149 (1918). This appears to be the interpretation placed on the phrase in 4 POMROY, EQUITY JURISPRUDENCE (4th ed. 1919) §1376.

must necessarily follow the repeated use of this ambiguous and misleading phrase.

The practice of explaining a refusal of reformation on the ground that the mistake involved is not mutual does not obtain in every jurisdiction. The writer has had occasion to examine the decisions of the Mississippi Supreme Court and has failed to find a single instance wherein relief was refused for the above reason,[20] and on only two occasions was the doctrine employed even as dictum.[21] The reason for its use on so large a scale in North Carolina is probably attributable in some measure to historical accident. The statement that equity will reform only for mistake of both the parties is traditional in the accepted texts.[22] It was found a convenient expression and early became established in the decisions. This alone, however, can hardly account for its persistent appearance. Its real justification lies in those very qualities of ambiguity and incompleteness we have criticized. It affords a screen behind which the court feels free to move. Being both orthodox and noncommunicative it offers an explanation entirely satisfactory to the profession, and gives the court a means of expressing certain equities of the concrete case which would otherwise remain inarticulate. It presents an appearance of uniformity in a field where many cases are solved as individual problems.

To ascertain the real function of the doctrine requiring mutuality of mistake we must examine the fact situations before the court at the time. In the case of *McMinn v. Patton*,[23] defendant, as surety, signed an appeal bond in the ordinary printed form. He was under the mistaken impression that he would thereby obligate himself only for costs of the appeal. The bond, however, provided that he should be liable for any loss incurred by the appellant's failure to abide the decision on appeal. Following an affirmance by the supreme court, execution was levied against the property of the appellant and returned unsatisfied, whereon suit was brought against defendant on the bond. To escape liability, defendant sought reformation of the instrument, but the court denied him relief, saying:

"In order to entitle defendant to equitable relief he must allege and prove a mistake of material facts on his part and that of plaintiff as well, or mistake on his part and some fraudulent practice or act on the part of the plaintiff whereby he was misled."[24]

[20] Malone and Keesee, *The Reformation of Writings Under the Law of Mississippi* (1936) 8 MISS. L. J. 329, 337.

[21] See Rogers v. Clayton, 149 Miss. 47, 55, 115 So. 106, 106 (1927); Whitney Cent. Bank v. First Nat. Bank, 158 Miss. 93, 98, 130 So. 99, 100 (1930).

[22] BISPHAM, THE PRINCIPLES OF EQUITY (5th ed. 1893) §469; POMEROY, EQUITY JURISPRUDENCE (3d ed. 1905) §676.

[23] 92 N. C. 371 (1885).

[24] McMinn v. Patton, *supra* at 374.

Despite this oblique explanation by the court, it is submitted that the decision is thoroughly sound. The bond constituted the initial agreement between the plantiff and defendant. The only mistake of the latter was his misunderstanding of the nature of the transaction he entered.[25] To all reasonable appearances he bound himself to the full extent of the bond, and should not be allowed to escape liability after the other party has acted in reliance on his conduct.

In the case of *Crawford v. Willoughby*[26] plaintiff agreed to execute a deed of certain property to defendant. It was understood between the parties that the defendant would support plaintiff the remainder of his life in exchange for the conveyance. No provision to this effect was included in the deed. Later, defendant breached her agreement, whereupon plaintiff instituted an action to reform the deed by including therein a condition subsequent whereby the conveyance would be defeated should defendant cease to fulfill her contract. Although it was reasonably clear that defendant had obligated herself to provide for plaintiff, yet it nowhere appeared that the parties had contemplated the result of a failure to fulfill this obligation. Certainly there was no evidence that either of them intended to provide for such a possibility in the deed. Reformation was desired here solely for the purpose of rescinding the transaction. The court properly denied relief and explained its judgment by saying that there was no evidence of a mutual mistake. Perhaps a better explanation is that plaintiff had simply failed to protect himself when protection was available and the court is now powerless to help him. It is interesting to note that this same result was reached in an earlier decision on similar facts without resort to the requirement of mutuality of mistake.[27]

The doctrine was put to a most interesting use in the case of *Shook v. Love*.[28] One Currie had granted Love the right to cut timber on certain premises for a period of three years. This was in February, 1911. In November of the same year Currie granted Shook rights to cut the timber on the same land. At the time of the grant both parties knew of Love's interest, although the earlier deed was not on record. No reservation was requested by Currie, because he believed Shook's knowledge was sufficient protection. The latter recorded his deed at

[25] A similar case is Wiggins et al. v. Sun Underwriters Ins. Co., 196 N. C. 546, 146 S. E. 216 (1929). The problem here was likewise solved under the "mutual mistake" formula. In Lloyd v. Speight, 195 N. C. 179, 141 S. E. 574 (1928) the same general situation was disposed of by use of the requirement of clear and convincing testimony.

[26] 192 N. C. 269, 134 S. E. 494 (1926).

[27] Helms v. Helms, 135 N. C. 164, 47 S. E. 415 (1904). Where such a condition is agreed to by both parties and it is their wish that it should appear in the deed, reformation should be available. See Martin v. Martin, 205 N. C. 157, 159, 170 S. E. 651, 652 (1933).

[28] 170 N. C. 99, 86 S. E. 1007 (1915).

once, and in so doing became legally entitled to the timber rights as against Love. He brought an action to eject Love from the premises. Love sought reformation of Shook's deed so as to reserve his own interest, but this was refused on the ground that there was no mutual mistake between Currie and Shook. We can gain an unusual insight into the technique of dealing with reformation problems by comparing the above case with that of *M. P. Hubbard & Co. v. Horne*,[29] decided several years later. Here Horne mortgaged certain crops to the North Carolina Bank & Trust Co. in February, 1930. The mortgage was immediately presented for registration, but through error of the Registrar of Deeds it was not indexed until November of that year. Meanwhile Horne agreed to give Hubbard & Co. a second mortgage on the same crop. At first he included a clause in the mortgage making Hubbard's interest subject to the prior lien of the bank; but he deleted this provision on Hubbard's assurance that the bank's interest would be protected by reason of its prior registration. It appears that Horne was not aware that the bank's mortgage was not indexed, although the fact was known by Hubbard. When Horne and the bank discovered the truth they sought to have Hubbard's mortgage reformed by reinserting the clause which affirmed the priority of the bank's lien. It was held that a good cause of action for reformation was stated. The court centered its entire discussion around the question of whether or not reformation is available to correct a mistake of law induced by fraud. When so phrased the problem could admit only of a solution favorable to plaintiff.

In both the above cases it will be noted that the common grantors executed deeds in the exact language they intended. In neither instance was there a mistake in reducing the agreement to writing. Both grantors possibly would have demanded protection for the first grantees in the later deeds, had they been fully aware of the true situation. But this is not commonly accepted as a reason for reformation. As was said by one court:

"A mistake as to the existing situation, which leads either one or both of the parties to enter a contract which they would not have entered into had they been apprised of the actual facts, will not justify reformation. It is not what the parties would have intended if they had known better, but what they did intend at the time, informed as they were."[30]

[29] 203 N. C. 205, 165 S. E. 347 (1932).

[30] Russell v. Shell Petroleum Co., 66 F. (2d) 864, 867 (C. C. A. 10th, 1933). Compare Whitney Cent. Bank v. First National Bank, 158 Miss. 93, 130 So. 99 (1930). In the latter case the court said:

"What did the mortgagor intend to do at the time, informed as he was, not what would he have done, or have intended to do, had he been differently informed, or known better? To push the doctrine of mistake beyond the limits thus stated would be to involve business transactions in an unendurable uncertainty, for it is

Perhaps the court in *Hubbard v. Horne* felt that the moral considerations involved greatly outweighed the value of the principle stated above. The problem directly before it was one bearing exclusively on the policy of the Recording Act.[31] Should mere inadvertence in the indexing of the bank's deed be sufficient to deny it the protection of a prior registration when the circumstances attendant on the execution of the second mortgage were such as here? The courts of this state have adopted a strict policy in regard to notice and registration in order to encourage immediate and proper recording.[32] But how far is the court willing to go in imposing hardships on those who it feels have acted with due dispatch and diligence in complying with the requirements of the law? This is the real question involved in both the decisions, and it admits of no uniform solution. When so viewed, the case of *Shook v. Love* is easily distinguishable. Love had made no bona fide effort to record his deed. Nor is it at all clear that Currie entertained any serious desire to protect him. Certainly Currie's real wishes were not frustrated by any fraud of the second grantee. Under these circumstances, the court very properly felt that the rigid requirements of the Recording Act should

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no less than an obvious fact that many, very many, of our executed contracts express intentions, which have been formed out of a succession of mistaken considerations. And if the door is opened, where in the order of succession is it to be closed . . ." (*id.* at 98).

[31] N. C. CODE ANN. (Michie, 1935) §3311.

[32] Under the law of North Carolina, no notice, however full, can take the place of registration: Threlkeld et al. v. Malcragson Land Co., 198 N. C. 186, 151 S. E. 99 (1930); Dye v. Morrison et ux., 181 N. C. 309, 107 S. E. 138 (1921). Thus the parties to a subsequent deed can utterly ignore an earlier but unrecorded conveyance. Even though reference is made to the latter in the subsequent instrument, this is not sufficient if the reference appears in the warranty instead of the habendum or premises of the deed. Hardy v. Abdallah, 192 N. C. 45, 133, S. E. 195 (1926). Furthermore, a chattel mortgage is not entitled to the benefit of registration unless it is properly indexed. Merchants' & Farmers' Bank v. Harrington, 193 N. C. 625, 137 S. E. 712 (1927). The hardships which must necessarily follow the application of these rules has caused the court to be liberal in allowing reformation whenever it can be shown that the parties to the second instrument intended to preserve the priority of the earlier conveyance or lien by appropriate reservation in their document. See the following cases allowing reformation: Gray v. Mewborn, 194 N. C. 348, 139 S. E. 695 (1927); Lee v. Charitable Brotherhood No. 4, 191 N. C. 359, 131 S. E. 729 (1926); Roberts v. Massey, 185 N. C. 164, 116 S. E. 407 (1923); Sills v. Ford, 171 N. C. 733, 88 S. E. 636 (1916); Bank of Union v. Redwine, 171 N. C. 559, 88 S. E. 878 (1916).

The court, by allowing reformation under the circumstances set forth above, in effect gives the first grantee priority over a later one who in *good faith* intended to preserve the former's interest but neglected to do so. At the same time it is willing to subordinate the interest of the first grantee to that of a later one who *wrongfully* avoided the prior conveyance by intentionally ignoring it. From this it appears that the court is possibly penalizing the parties for their honest intentions. In answer, it may be said that the reason for allowing one who takes with notice priority over an earlier unrecorded interest is not to encourage dishonesty, but rather to encourage prompt and efficient registration. Consistent with this interest, the court may still demand that those parties who start out with honest intentions must not depart therefrom. In other words, it need not require honesty of everyone in order to insist that those who are honest remain so.

not be relaxed. Although this was the essential problem in both cases, the court managed to avoid direct reference to it. It succeeded in reaching the results desired in both instances by resorting to broad abstract principles which have little to do with the question presented. By solving the cases under two different formulae it creates the appearance of dealing with unrelated problems.

One of the most frequent uses to which the doctrine of mutuality of mistake has been put is in the adjustment of the rights of the parties to an insurance contract. The relationship between insurer and insured differs radically from the normal contract relationship.[33] The insurer deals in a standardized type of contract, the terms of which it has fixed in advance. The main objectives in view are to attract policy holders and at the same time afford a maximum of protection for the insurer. The bargaining powers of the respective parties are seldom equal. Furthermore, insurance is issued through standardized methods involving the intervention of a local agent who has no contracting power himself, but who nevertheless contacts the prospective policyholder and represents to him what the terms of the contract will be. Thus, although insurance policies are still governed largely by the law of contracts, they more nearly represent interests normally covered by the law of sales of personal property. The public regards the "buying" of insurance much as it does the buying of any ordinary commodity.[34] It is impossible that this difference between the insurance contract and the ordinary bargain should not materially affect the court's attitude when the question of reforming a policy is before it.

The attitude in such cases is marked by a desire to allow reformation at the instance of the insured whenever this can be done without real injustice to the insurer. Yet there are certain outside limits beyond which it would be highly impolitic to go. These limits vary with the circumstances of each case and can not be delineated in advance. Hence the court must again resort to some noncommunicative doctrine in order to explain its decision in acceptable language. An examination of a few of the insurance problems and the technique of their solution will be profitable. In one case,[35] plaintiff was induced by a soliciting agent to take a life insurance policy with defendant company. The agent fraudulently represented that at the end of ten years plaintiff could surrender his policy and receive all money paid in, together with interest thereon at four per cent. When the agent delivered the policy he so read it to plaintiff that it deceitfully appeared that

[33] Patterson, *The Delivery of a Life Insurance Policy* (1919) 33 HARV. L. REV. 198.

[34] Note (1925) 35 YALE L. J. 203, 206.

[35] Sykes v. Life Ins. Co. of Virginia, 148 N. C. 13, 61 S. E. 610 (1908).

this surrender clause was included. At the end of the ten year period plaintiff demanded the return of his money according to the terms of the contract as represented to him, and on refusal by defendant, he instituted this action. In the lower court the case was properly submitted to the jury on the theory of *rescission* and a verdict was returned for plaintiff. Defendant appealed on the ground that since plaintiff was seeking to rescind he must restore the value of such benefit as he had already received, namely, the reasonable value of the protection afforded him during the period. Thus the question squarely before the court was plaintiff's right to rescind without placing defendant *in statu quo*. This question had been directly considered in a previous case and there the court had refused to require plaintiff to repay the value of his protection.[36] It felt that since the insurance company had never been called on to pay, it had suffered no loss.[37] Perhaps the wisdom of this policy is doubtful, but we are not prepared to quarrel with the court's conclusion. In the case under discussion, however, the problem was evaded. The supreme court held that the case was a proper one for *reformation,* not rescission, and for this reason no question of placing defendant *in statu quo* was involved. To reach this conclusion the court resorted to the doctrine of mutuality of mistake which it stated in converse form:

"It is not always essential to the reformation of a contract that there should be a mutual mistake of the parties in draughting it. The mistake of one party induced by the fraud of the other is quite sufficient to entitle the defrauded party to the aid of a court of equity."[38]

The difficulty here is obvious. Although fraud was present, yet the fact remains that the agent had no power to make a contract. By legal fiction we can attribute his guilty knowledge to the principal, but we cannot with equal ease translate the agent's untruthful inducement into a binding contract to which the insurer consented. If the court takes this latter step it must do so with full realization that it is creating a contract for the parties. So far as the insurer was concerned, its first contractual act was the issuance of the policy without the clause desired by the petitioner. The case, as decided, stands as precedent for a rule that equity will correct an insurance policy so as to make it conform to fraudulent statements of inducement by the agent. It is apparent that

[36] Caldwell v. Life. Ins. Co. of Virginia, 140 N. C. 100, 52 S. E. 252 (1905). See Stroud v. Life Ins. Co. of Virginia, 148 N. C. 54, 61 S. E. 626 (1908).

[37] The court said further:

"If the defendant has been compelled to carry the risk during the life of the policies without compensation, it must look to its accredited agent, whom the jury finds made the false representation." Caldwell v. Life Ins. Co. of Virginia, 140 N. C. 100, 104, 52 S. E. 252, 254 (1905).

[38] Sykes v. Life Ins. Co. of Virginia, 148 N. C. 13, 20, 61 S. E. 610, 613 (1908).

no such broad doctrine was intended by the court. The only problem before it was the right of the insured to rescind without returning the reasonable cost of the protection he enjoyed. In order to decide this question from ambush, the court made an unhappy choice of doctrine. The same case was later pressed to its attention as authority. Plaintiff had purchased a policy of insurance from defendant induced by the fraudulent statement of the agent that the policy provided indemnity for loss of eyesight. While the policy was in force plaintiff lost the use of his eyes and sought reformation of the policy so as to include protection as represented. The lower court refused to submit an issue of reformation to the jury, but instructed them that the plaintiff could rescind the contract and recover the premiums he had paid in. The supreme court, in affirming the case on appeal, was forced to repudiate the language of the earlier decision.[39]

The question remains: will equity ever reform an insurance policy where the sole ground of complaint is a mistake or false representation by the agent? On one occasion the court announced that it could never do so unless the agent had power to make an insurance contract on behalf of the company.[40] This policy has been consistently adhered to in situations where the desired change amounts to an extension of the protection afforded by the policy.[41] The court doubtless feels that the insurer should not be deprived an opportunity of determining the financial expediency of insuring the risk. However, if the policy contains some defect which at the time of its issuance neither party could reasonably have considered of any importance, but which later deprives the insured of all benefit under his contract, the court will not hesitate to reform the policy into what it considers a just and proper agreement.[42]

[39] Burton v. Life & Casualty Co., 198 N. C. 498, 152 S. E. 396 (1930); *cf.* Clements v. Life Ins. Co. of Virginia, 155 N. C. 57, 70 S. E. 1076 (1911).

[40] Floars v. Aetna Life Ins. Co., 144 N. C. 232, 56 S. E. 915 (1907).

[41] Floars v. Aetna Life Ins. Co., 144 N. C. 232, 56 S. E. 915 (1907) (policy would not be reformed to cover loss of eyesight); Graham v. Mutual Life Ins. Co., 176 N. C. 313, 97 S. E. 6 (1918) (policy would not be reformed to include certain "options" desired by plaintiff); Wiggins et al. v. Sun Underwriters Ins. Co., 196 N. C. 546, 146 S. E. 216 (1929) (fire insurance policy would not be reformed to include New York Standard Mortgage Clause); Burton v. Life & Casualty Ins. Co., 198 N. C. 498, 152 S. E. 396 (1930) (policy would not be reformed to cover loss of eyesight).

In reaching the conclusion above, the court resorted severally to the doctrine of mutuality of mistake, the negligence and laches of complainant, and complainant's failure to read the policy before accepting.

No attempt is made herein to include reformation problems arising from the untruthfulness of some representation or warranty in the application caused by the agent's fraud or mistake.

[42] Changes in the names of the beneficiaries were allowed in McIntosh v. North State Fire Ins. Co., 152 N. C. 50, 67 S. E. 45 (1910) and Williams v. Greensboro Fire Ins. Co., 209 N. C. 765, 185 S. E. 21 (1936).

REFORMATION FOR MISTAKE OF LAW

A written instrument may fail to express the intention of the parties because the terms agreed on were not accurately transcribed. In such case the mistake is one of fact. Often, however, the parties employ the precise words of their agreement, but there is a mistake regarding the legal effect of the words in the writing. If for this reason the agreed purpose of the transaction is frustrated, there is no valid reason why reformation should not be available. The choice of terms is a mere step in the reduction of the bargain to writing. Hence any error occurring at this stage is within the province of reformation. However, mistake of law has given the court considerable difficulty, due to a misapprehension of the statement so often employed in criminal proceedings that ignorance of the law is no excuse. This doctrine, although vitally necessary in criminal actions, to secure public safety, has no place in a decision involving only private rights.[43] The language of the various decisions in this state is utterly irreconcilable. The confusion is apparent from the following quotations selected from the cases:

"When an instrument is intended to carry an agreement into execution, but, by means of a mistake either of fact or of law, does not fulfill that intention by passing the estate or thing bargained for, equity corrects the mistake. In the exercise of this jurisdiction no distinction is taken in any of the cases between real or personal property, whether the mistake be in reference to a matter of law or of fact."[44]

"In mistakes of this kind the only inquiry is, does the instrument contain what the parties intended that it should, and understood that it did? . . . And it is wholly immaterial whether the defect is a statutory or common-law requisite, or whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect."[45]

But on another occasion the court used the following language:

"But the mistake was one of law, and not of fact, and a Court of Equity never corrects mere mistakes of law, save in exceptional cases, where the mistake is mixed up with other equitable elements, as in cases of imposition, misrepresentation, undue influence, misplaced confidence and surprise.

"His ignorance is no excuse, for every man is presumed to know the law."[46]

A few years later the court, in allowing reformation of an agreement for mistake of law where none of the "other equitable elements"

[43] 3 WILLISTON, CONTRACTS (1920) §§1580-1591; Stadden, *Error of Law* (1907) 7 COL. L. REV. 476; cases collected in note (1925) 39 A. L. R. 194.

[44] McKay v Simpson, 41 N. C. 452, 454 (6 Ire. Eq.) (1849).

[45] King v. Hobbs, 139 N. C. 170, 173, 51 S. E. 911, 912 (1905). Also see Condor v. Secrest, 149 N. C. 201, 204, 62 S. E. 921, 922 (1908).

[46] Sandlin v. Ward, 94 N. C. 490, 495 (1886).

enumerated above were present, referred to the above statement with approval but dismissed it by saying:

"Of course a court of equity will only correct a mistake when *equity* requires it."[47]

In the case of *Morehead Banking Co. v. Morehead*[48] the following language was used:

"Equity, for many reasons, will reform and correct facts; but as a general rule it does not correct errors of law. It is said there are exceptions to this general rule; but what are called exceptions by some writers are in fact not exceptions. When they are examined, it will be found that there is some fact, some inducement, some fraud, connected with the transaction that raises the equity."[49]

It is interesting to compare this language with the following statement from the case of *Pelletier v. Cooperage Co.*:[50]

"The principle relied upon [mistake of law] was never, perhaps, as broad as it sounds, and in its practical application has been very much qualified in the later decisions. . . . 'The most broadly accepted doctrine, however, appears to be that a mere naked mistake of law, unattended by any special circumstances furnishes no ground for relief by reformation, but if the mistake involves fact as well as law or is attended by special circumstances, equity will relieve if the mistake is mutual, so long as the power is not extended to the making of a new contract for the parties.'

"A mistake of law in this connection simply means that made in the absence of equitable circumstances. 'A mere naked mistake of law,' when the parties have correctly expressed the agreement they intended to make, will not be relieved against because they acted in ignorance of the legal effect of the instrument they have executed. . . ."[51]

This last quotation appears to be the latest pronouncement on the subject by the court. It will be noted that in all the statements above it is said that reformation will be granted for mistake of law provided there is some *additional* ground for relief. The point of difference between the cases lies in what this additional ground must consist of. On two occasions[52] the court declared that there must be fraud or imposition of some sort. In other decisions the mere presence of "equitable circumstances" seems to be sufficient. It has already been observed that the real ground for reformation is the fact that the true agreement of the parties does not accurately appear in the writing. If this condition

[47] Kornegay v. Everett, 99 N. C. 30, 35, 5 S. E. 418, 421 (1888).
[48] 124 N. C. 622, 32 S. E. 967 (1899). [49] *Id.* at 624, 32 S. E. at 968.
[50] 158 N. C. 403, 74 S. E. 112 (1912). [51] *Id.* at 406, 407, 74 S. E. at 113.
[52] See note 46, *supra* and Morehead Banking Co. v. Morehead, 124 N. C. 622, 32 S. E. 967 (1899). Of course where there is fraud on the part of defendant the case is a clear one for relief. M. P. Hubbard & Co. v. Horne, 203 N. C. 205, 165 S. E. 347 (1932).

obtains and the court is otherwise satisfied that there is a genuine need of relief, it will not refuse reformation because the mistake was one of law and not of fact.[53] The quotations above, asserting the contrary, are from cases easily accounted for on other grounds.

In the case of *Morehead Banking Co. v. Morehead,* defendant Lucy Morehead, executed a note to secure funds for the payment of debts incurred by her husband in his lifetime. She signed in the capacity of executrix, being under the belief that she would not be personally liable on the note. There were several subsequent renewals, all made in the same form. Finally an action was instituted in which it was sought to make her liable personally. In defense she requested the court to reform the note so as to include a provision exempting her from personal liability. Relief was properly refused. There was no evidence that the note was intended to express a prior agreement to this effect. Her belief that she was not so liable was simply her personal conception of the transaction. We have already considered similar facts wherein the court explained its refusal to intercede by saying there was no mutual mistake.[54] In the present case the doctrine of mistake of law was not resorted to in the first appeal. It was only on rehearing that the court supported its original conclusion by this language. In connection with this case it should be further noted that the court could not allow reformation under the facts given above without violating the well settled policy that an administrator cannot make any contract to bind the estate of his intestate. This reason alone should be sufficient to preclude relief.[55] In the case of *Sandlin v. Ward*[56] the court refused to reform a covenant not to sue on the ground that the mistake was one of law. The facts were as follows: *X* and *Y,* both deceased and having estates open, had made a note to one *H,* which remained unpaid. Plaintiff had made a note payable to *Y,* but this obligation could not be found among the papers of the latter at his death. *H* died and *A* was appointed his executor. *A* persuaded plaintiff to purchase the note made by *X* and *Y,* and held by his testator, in order that plaintiff might use the same as a set-off against *Y's* administrator should plaintiff's note to *Y* be found. *A* further persuaded plaintiff to execute a covenant not to sue *X's* administrator on the note. Later plaintiff was informed by

[53] In the following cases reformation was allowed for mistake of law without discussion: McRae v. Fox, 185 N. C. 343, 117 S. E. 396 (1923); Gray v. Mewborn, 194 N. C. 348, 139 S. E. 695 (1927).

[54] Compare McMinn v. Patton, 92 N. C. 371 (1885) and cases cited note 25 *supra.*

[55] Compare Graham v. Mutual Life Ins. Co., 176 N. C. 313, 97 S. E. 6 (1918) where the court, in refusing to reform a life insurance policy, assigned as a reason, among others, that the effect of correcting the policy as requested would be to allow plaintiff larger proportionate dividends than other policy holders of the same class, which would be illegal and void. [56] Sandlin v. Ward, 94 N. C. 490.

counsel that this covenant might operate as a discharge of *Y's* administrator. Thereupon he sought reformation of the agreement to exclude *Y* from its protection. The court refused reformation on the ground, among others, that the mistake was one of law. The conclusion can easily be accounted for on other grounds. As stated by the court, the action was premature.[57] It did not appear in the pleadings in what capacity *Y* had signed the note, and there would be no need for reformation unless he had signed as surety. Furthermore, until the plaintiff's note was found, there could be no injustice in refusing relief. Although these reasons are slightly persuasive, there is yet a more fundamental objection to reformation here. There is nothing to indicate that *A* would have accepted the covenant in the form desired by plaintiff. This alone is fatal to plaintiff's right to reformation.

Although the fact that the mistake is one of law should not of itself be sufficient ground on which to refuse relief, yet the presence of such a mistake often characterizes a situation outside the scope of reformation. When parties attempt to carry their agreement into effect by executing a legal document of technical nature they thereby enter onto unfamiliar ground, and are usually aware of this. In such cases there is always the possibility that they have consciously assumed the risk that the writing may not carry their agreed purpose into operation, and that strange consequences may result from their effort. Society provides a learned profession versed in the technique of the law to minimize this very danger. If, knowing this, the parties determine to "take a chance," perhaps equity should refuse to intervene. However, there is no definite borderline between common agreements made in the run of commerce and those involving a more esoteric technique. Only the layman can take the initial step toward securing legal coöperation, and he can hardly be expected to pay for legal advice when in good faith he feels that such is unnecessary. The court cannot delineate its horizon in advance but must treat each case as an individual problem. Perhaps an interest by the court in the law as an institution which must necessarily deal in occult language, together with the court's desire that as many legal complications as possible should be forestalled in advance by intelligent cooperation between layman and attorney, are sound social policies which should be recognized in the decisions.[58] If so, they may find some degree of expression through the uneven statements that equity will not

[57] Compare Gray v. James, 147 N. C. 139, 60 S. E. 906 (1908) where reformation was denied because the action was premature (two judges dissenting).

[58] See the dissenting opinion of Walker, J., in McRae v. Fox, 185 N. C. 343, 117 S. E. 396 (1923). He seeks to express this policy by denying relief for lack of mutuality of mistake. This latter doctrine is an equally satisfactory conduit of the above idea. It has the advantage of greater flexibility than the "mistake of law" formula.

reform a writing for a mistake of law standing alone. At most, however, the doctrine does little more than suggest the predisposition of the court.

The Effect of Negligence and a Failure to Read the Instrument

If the parties to a writing exercise that degree of care which the occasion demands when viewed in retrospect, there would seldom be any need for resort to the courts for reformation. A mistake made in reducing an agreement to writing is usually accompanied by a want of attention on the part of someone. Although the decisions abound in statements that the court will not reform an instrument if the plaintiff is guilty of negligence,[59] this restriction is seldom recognized as the sole reason for refusing relief. Usually there are other grounds, such as a change of position. This has been expressly recognized in at least one decision.[60] The effect to be given the negligence of the complainant varies with the circumstances of each situation. The doctrine is frequently heaped into the verbiage of decisions otherwise to be accounted for, sheerly to supply extra weight.

Closely allied is the problem of failure to read a document as constituting a bar to relief. In some cases failure to read has been treated simply as an aspect of negligence, and when so regarded it offers no serious obstacle to correction of the writing.[61] On other occasions, however, it has been regarded as a problem of *waiver*.[62] In some instances such a view is not wholly without the support of reason. Where two parties have opposed conceptions regarding the terms of an original ambiguous agreement and one of them draws up the writing according to his understanding of the transaction, if the other signs or accepts the document after an opportunity to read the same he may justly be

[59] The following cases are representative: Clements v. Life Ins. Co. of Virginia, 155 N. C. 57, 70 S. E. 1076 (1911); Perry v. Southern Surety Co., 190 N. C. 284, 129 S. E. 721 (1925); Cromwell v. Logan, 196 N. C. 588, 146 S. E. 233 (1929). *Contra*, see King v. Hobbs, 139 N. C. 170, 173, 51 S. E. 911, 912 (1905), where the court said:

"It is immaterial how the mistake happened, whether by a misunderstanding of the meaning of the words or through sheer carelessness."

[60] "But if plaintiff had been negligent, it does not follow that he has lost thereby his right to relief (reformation). 'Even negligence may not in all cases close the doors of Chancery against a complainant; for if the position of either party had not been changed in consequence thereof relief may be granted'." Finishing & Warehouse Co. v. Ozment, 132 N. C. 839, 850, 44 S. E. 681, 685 (1903).

[61] Boyden v. Clarke, 109 N. C. 664, 14 S. E. 52 (1891); Dellinger v. Gillespie, 118 N. C. 737, 24 S. E. 538 (1896); Bank of Union v. Redwine, 171 N. C. 559, 88 S. E. 878 (1916). In American Potato Co. v. Jeannette Bros. Co., 174 N. C. 236, 93 S. E. 794 (1917) it was held that the fact that complainant read the instrument did not affect his right to reformation. But in this case it is clear that no inspection of the writing would have disclosed the error.

[62] School Commissioners v. Kessler, 67 N. C. 443 (1872).

regarded as having outwardly, at least, manifested his willingness to be bound by the interpretation of the transaction as expressed in the writing. If the other party has then changed his position in reliance on this apparent assent he may contend with reason that the complainant should be estopped to assert his contrary understanding. However, such a situation could arise only where the terms of the original understanding are fluid and susceptible to two equally reasonable interpretations, or where they cannot adequately be fixed in favor of the complainant by the evidence. When such has happened, it is submitted that relief is better refused on the ground that plaintiff has failed to establish his case by clear and convincing testimony regarding the terms of the original bargain.

On other occasions it has been asserted that the duty of reading the document is a positive rule and failure to read is a circumstance against which no relief may be had either in law or equity.[63] Here again we can only say that this is bold language employed by the court in those instances wherein relief was not available, and it has been consistently ignored when the court felt that reformation should be forthcoming. Even when stating the rule as above, the court has qualified it by saying that a failure to read is excused when due to the fraud or misrepresentation of the other party.[64] It is noteworthy that in such instances the court has been extremely liberal in discovering fraud. In one case[65] the complainant had started reading the instrument and had indicated several errors therein when he was told by defendant that the writing conformed substantially to the agreement. Thereupon he ceased reading, but was thereafter allowed reformation. In another case,[66] the court submitted to the jury the question of whether or not innocent misrepresentation by defendant relieved complainant of the duty to read the instrument. When this "positive duty" can not be so excused, the doctrine may be discarded in favor of the milder statement that a failure to read is merely evidence of negligence.[67]

[63] Colt v. Kimball, 190 N. C. 169, 129 S. E. 406 (1925); Furst v. Merritt, 190 N. C. 397, 130 S. E. 40 (1925). In the latter case, the court said:
"It should be observed that the duty to read an instrument or have it read before signing it, is a positive one, and failure to do so is a circumstance against which no relief may be had, either in law or in equity" (*id.* at 402).

[64] Leonard v. So. Power Co., 155 N. C. 10, 70 S. E. 1061 (1911); Bell v. Jones, 151 N. C. 85, 65 S. E. 646 (1909); Gray v. James, 151 N. C. 80, 65 S. E. 644 (1909); Sykes v. Life Ins. Co. of Va., 148 N. C. 13, 61 S. E. 610 (1908); Griffin v. Roanoke R. & Lumber Co., 140 N. C. 514, 53 S. E. 307 (1906); Day v. Day, 84 N. C. 408 (1881). (It will be noted that some of the cases above involve rescission or action for fraud, rather than reformation. It appears from the language and constant interexchange of authorities that the same rule is applicable.)

[65] Gray v. James, 151 N. C. 80, 65 S. E. 644 (1909) cited *supra* note 64.

[66] Elam v. Smithdeal Realty Co., 182 N. C. 599, 109 S. E. 632 (1921) (action at law for fraud).

[67] See cases cited *supra* note 61.

Certainly the rule that failure to read is a positive bar to recovery cannot be accepted at its face value. However, it is important evidence reflecting unfavorably on the complainant's contention that the original agreement was not accurately transcribed in the instrument sought to be reformed. The fact that a departure from the agreement was not discovered by the parties when the deed was before them tends to show that the complainant's version of the transaction is not the true one.[68] If, however, he can establish his contention by other persuasive facts, he will likely have little difficulty in securing relief despite his failure to read the instrument before signing or accepting it.

Parties to Reformation Proceedings

Any party to a writing may have reformation. Although he must usually show that his interest in the transaction will be adversely affected if relief is not forthcoming, yet this interest need not consist of a tangible economic advantage. It has been held that one who has executed two mortgages, the first of which was improperly recorded, may have reformation against the second mortgagee to include a provision for the protection of the earlier encumbrancer, even though the priority of the respective liens could not affect him adversely.[69] However, if he does not choose to intervene, the prior mortgagee should be allowed relief, despite the fact that he is not a party to the encumbrance in which the error occurs. The technical obstacle to such procedure is the fact that the first mortgagee is neither a party to the second mortgage, nor is he in privity with one who is a party. It is commonly said that reformation is available only to the parties themselves or those in privity with them. The supreme court of this state has avoided the effect of this rule by a most ingenious although somewhat doubtful device. It is clear that such a problem will not likely arise unless the earlier mortgage is not recorded until after the second encumbrance is on record. When this happens the first recorded instrument takes priority. The court, seizing on this rule, has held that the priority of the second mortgage, gained by reason of the Recording Act, makes the unrecorded instrument a subsequent conveyance of the same property by a common grantor, and hence within the proper sphere of the rule allowing reformation in favor of one who

[68] The same may be said of ratification. If the party signing an instrument, thereafter recognizes it by taking some step consistent with the contract as expressed in the writing, this is cogent evidence that there was never any mistake. Ratification may also preclude relief by inducing defendant to change his position in reliance on plaintiff's conduct. Compare Life Ins. Co. of Virginia v. Edgerton, 206 N. C. 402, 174 S. E. 96 (1934) with Cromwell et al. v. Logan et al., 196 N. C. 588, 146 S. E. 233 (1929). In the former case the evidence of mistake was clear, and reformation was allowed despite the fact that plaintiff very positively ratified the instrument.

[69] Gray v. Mewborn, 194 N. C. 348, 139 S. E. 695 (1927); *cf.* M. P. Hubbard & Co. v. Horne, 203 N. C. 205, 165 S. E. 347 (1934) *semble.*

is in privity with a party to the erroneous document.[70] It is believed that the same result could be achieved by more straightforward means. On several occasions the court has allowed reformation by one who was intended to be a party to an instrument but whose name was mistakenly omitted therefrom.[71] Such a person is neither a party to the instrument nor one in privity. Yet the justice of allowing him reformation is apparent. He is a party to the transaction and his interest in the controversy is clear. This is equally true of the holder of a prior unrecorded deed or mortgage. If the parties intended that his rights should be reserved, it can hardly be denied that he has a real interest in the transaction. He participates therein somewhat in the capacity of a third party beneficiary. The requirement of privity has no place in reformation proceedings.

Reformation will not generally be allowed in favor of a person who gave no consideration for the instrument complained of.[72] This rule is eminently fair where the voluntary grantee seeks only to increase the extent of his gift through a correction of the writing. If he paid nothing for the grant he is hardly in a position to complain that the donor's bounty is not as inclusive as intended. Where, however, he seeks merely to correct a misdescription in the conveyance or deed of gift and to clarify what has already been granted, it is submitted that relief should be afforded him. In such cases, reformation is sought for the purpose of removing a cloud from the grantee's title rather than as a remedy to prevent unjust enrichment.[73] But it must be admitted that courts have not seen fit to draw this distinction. The general rule that equity will not reform a voluntary conveyance is subject to certain exceptions. If the grantee is the wife or child of the grantor, or is a person whom the grantor is under a legal duty to support, reformation will be allowed if the grantor has since died without altering his original intention, and if further the person against whom relief is sought has no equally meritorious foundation for his claim.[74] It has been held that the wife of the grantor's brother, toward whose support the grantor had often contrib-

[70] The leading case is Sills v. Ford, 171 N. C. 733, 88 S. E. 636 (1916). Followed in Bank of Union v. Redwine, 171 N. C. 559, 88 S. E. 878 (1916); Roberts v. Massey, 185 N. C. 164, 116 S. E. 407 (1923); Lee v. Charitable Brotherhood No. 4, 191 N. C. 359, 131 S. E. 729 (1926).

[71] See Grossett et al. v. McQueen et al., 205 N. C. 48, 169 S. E. 829 (1933); Hardin v. Myers, 197 N. C. 775, 147 S. E. 624 (1929).

[72] See Lamb v. McPhail, 126 N. C. 218, 35 S. E. 426 (1900); Powell v. Morisey, 98 N. C. 426, 4 S. E. 185 (1887); Hunt v. Frazier, 59 N. C. 90 (6 Jones' Eq.) (1860). In the last named case, the court strained a point to discover a "valuable" consideration.

[73] For example, see Elias v. Arthur, 186 N. C. 755, 120 S. E. 588 (1923) where the error in the description of premises conveyed was apparent on the face of the instrument.

[74] Hunt v. Frazier, 59 N. C. 90 (6 Jones' Eq.) (1860); *cf.* Powell v. Morisey, 98 N. C. 426, 4 S. E. 185 (1887).

uted, was not a party entitled to reformation against the grantor's heirs under this exception.[75]

Reformation is available against either a party to the writing or one who holds under such a party.[76] The right to relief is extinguished only when the superior rights of a bona fide purchaser for value have intervened.[77] The cases are not very clear as to what constitutes value in this connection. The court has intimated that one who takes a conveyance of property as security for an antecedent debt is not a purchaser for value;[78] nor is a trustee who takes an assignment of property for the benefit of the grantor's creditors.[79] The court of this state has little difficulty in allowing reformation even though the rights of a judgment creditor have intervened.[80] Such a creditor has no rights superior to those of his debtor and takes subject to any equities outstanding against the property. This is applicable also to a purchaser at execution sale.[81] His rights cannot rise above those of the creditor under the execution of whose judgment the sale was made. The status of neither the judgment creditor nor the purchaser at execution sale has been altered by the Recording Act. It has been held that the act has no application to any interest arising solely by implication of law and therefore not susceptible of being registered.[82]

There is considerable conflict among the authorities throughout the

[75] Hunt v. Frazier, 59 N. C. 90 (6 Jones' Eq.) (1860). Also Powell v. Morisey, 98 N. C. 426, 4 S. E. 185 (1887) (grandchild of deceased grantor not entitled to reformation where latter did not stand *in loco parentis* toward grantee).

[76] Scott v. Queen, 94 N. C. 462 (1886) (reformation allowed between co-grantees); Butler v. Durham, 38 N. C. 589 (3 Ire. Eq.) (1845); Armistead v. Bozman's Heirs, 36 N. C. 117 (1 Ire. Eq.) (1838) (reformation against surety). *A* conveys property to *B*, and includes in the deed a certain interest not contemplated by the parties. *B* conveys to *C*, who takes with notice of the mistake. *A* cannot have reformation against *B*, because the latter has parted with his interest. But he may have the deed corrected against *C*. Moore v. Moore, 151 N. C. 555, 66 S. E. 598 (1909); Pelletier v. Cooperage Co., 158 N. C. 403, 74 S. E. 112 (1912) *semble*. In such situation it is deemed advisable to join all intermediate parties. However, failure so to do was held not fatal to the cause of action in Moore v. Moore, *supra*, where the plaintiff had been holder of the beneficial interest all along; *cf.* Lewis v. Pate, 208 N. C. 512, 181 S. E. 623 (1935).

In an action by a trustee in a deed of trust for reformation against the maker, failure to join the *cestui* was held sufficient ground for demurrer, First National Bank of Durham v. Thomas, 204 N. C. 599, 169 S. E. 189 (1933); *cf.* Alexander v. Virginia-Carolina Joint Stock Bank, 201 N. C. 449, 160 S. E. 460 (1931).

[77] Reformation is not available against a bona fide purchaser: Dameron v. Rowland Lumber Co., 161 N. C. 495, 77 S. E. 694 (1913), on rehearing, 163 N. C. 278, 79 S. E. 607 (1913); Henry v. Smith, 76 N. C. 311 (1877); Sealey v. Brumble, 59 N. C. 295 (1862).

[78] Small v. Small, 74 N. C. 16 (1876) *semble*.

[79] Day v. Day, 84 N. C. 408 (1881).

[80] Grossett v. McQueen, 205 N. C. 48, 169 S. E. 829 (1933); Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32 (1923).

[81] Johnson v. Lee and Crowley, 45 N. C. 43 (1852); see Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32 (1923).

[82] See cases cited *supra*, note 80.

country as to whether or not a purchaser at a foreclosure sale can have reformation as against the mortgagor when the mistake appeared in the mortgage and was perpetuated in the deed executed pursuant to foreclosure.[83] The difficulty generally arises from the fact that there is no privity of contract between the purchaser and the mortgagor, and also from the fact that the intervening mortgage was extinguished by the foreclosure proceeding. It would appear that such objections are highly technical and serve no useful purpose in the law. A further objection often asserted against relief is that the effect of reformation under such circumstances would be to create a mortgage and extinguish it in the same operation, thereby depriving the mortgagor of his right of redemption.[84] But this need be no insuperable obstacle. If the court feels that the mortgagor will be deprived of any substantial right, it may in its discretion reform the deed only on condition that the property be resold and the equity of redemption reopened.[85] In North Carolina it has been held that a purchaser at foreclosure sale may have reformation under facts similar to those heretofore considered.[86] In this case, however, the mortgagee himself purchased the property on foreclosure. Hence the court had no difficulty finding privity of contract between the parties. It decided the case on this ground, thereby leaving the broader question unanswered.

Conclusion

The difficulty encountered in reformation proceedings is almost wholly administrative. At the heart of the problem is the task of sifting the evidence and eliminating nonessentials. The court's main objective is to discover whether or not, prior to the execution of the document the parties reached an understanding in regard to the terms in dispute. If the writing was the initial accord between them, they can hardly demand that equity intervene and reform their bargain. However, if the execution of the instrument complained of marked only the culmination of the transaction and if the contractors had earlier prescribed the limits of their agreement, the first prerequisite to reformation is satisfied. The next task of the court is to fix the terms of the original agreement with as much precision as the evidence will allow. This is the most delicate phase of the reformation process. The court must unravel the transaction and distribute the component parts into accepted legal categories. It must separate the terms of the bargain from factors of inducement as well as from the maze of tacit understandings in which the

[83] 2 Ames, Cases in Equity Jurisprudence (1929) 227, note 3.
[84] For example, see Provost v. Rebman, 21 Iowa 419, 422 (1866).
[85] See Busey v. Moraga, 130 Cal. 586, 62 Pac. 1081, 1082 (1900).
[86] Harvey & Son v. Rouse, 203 N. C. 296, 165 S. E. 714 (1932). But *cf.* Springs v. Harven, 56 N. C. 97 (1856).

bargain is imbedded. It is in this process that the court usually reaches its conclusion as to whether or not relief will be forthcoming. Since the parties seldom make this apportionment themselves, the court must often do it for them.

Although the circumstances attendant on the transaction usually enable the court to fix the terms of the agreement with some degree of confidence, often features of inducement, half-formulated understanding and contract are too inextricably interwoven to permit definite classification. When this is the situation, the court may feel that the written agreement should stand unreformed, since it is as definite a delineation of the contract as is feasible. But, on the other hand, it may be impressed by the palpable injustice of the bargain represented by the writing and feel that common honesty demands a better contract. When this appears the court may extricate from the transaction what it believes *should* be the bargain. Within the limits of the broad fact situation there is usually ample opportunity for play of discretion without violation of the best interests of the defendant. Considerations of policy enter here. The conduct of the parties, the equality of their bargaining power and the prophylactic effect of granting or refusing relief are all factors having a strong persuasive effect on the decision. The horizon cannot be delineated in advance, and each case must be treated largely as an individual problem.

Although the solution of reformation problems is usually reached during the process of marshalling the facts, yet the court has the equally important task of explaining its decision in legally acceptable language. It cannot always give us a uniform law, but it must preserve the appearance of uniformity. It is not enough that the court has reached a conclusion in accord with its best sense of ethical fitness and has served those policies it deems most important. It must further translate its decision into the accepted phrases of legal thinking. Five broad principles relating to reformation have been heretofore set forth and discussed. In the run-of-the-mine cases these principles have a fairly definite relationship to the problem involved. However, because of their uncertain content, they have a negligible value as predictions. They tend to fix the court's attitude and emphasize the sanctity with which it regards written agreements solemnly entered into. But their greatest value is their capacity to explain decisions to the satisfaction of all concerned, without fully exposing the machinery of solution. They are likely to be explanations only after the fact of decision, giving a comfortable semblance of uniformity in a field where uniformity does not always obtain. It is true that within their confines are embraced many ideas of social and economic policy, but they do not intelligently convey

the effect to be given these conflicting policies in the concrete case. It is believed that a clear understanding of the outside limits of reformation together with a careful study of the court's attitude toward the varied problems confronting it are the most dependable guides available to the lawyer.

APPENDIX

A list of the types of instruments which have been reformed follows:

DEEDS

Under early law in North Carolina a fee simple estate would not pass to the grantee unless words of inheritance were expressed in the deed. It was a common mistake for a grantor, intending to pass a fee simple, to neglect to include the words, "and his heirs forever," in the deed. In such instances equity would reform the deed: Moore v. Quince, 109 N. C. 85, 13 S. E. 872 (1891); Vickers v. Leigh, 104 N. C. 248, 10 S. E. 308 (1889); Durant v. Crowell, 97 N. C. 367, 2 S. E. 541 (1887); Hunt v. Frazier, 59 N. C. (6 Jones' Eq.) 90 (1860); Rutledge v. Smith, 45 N. C. 283 (1853). See also the following cases: Cedar Works v. Roper Lumber Co., 168 N. C. 391, 84 S. E. 521 (1915); Powell v. Morisey, 98 N. C. 426, 4 S. E. 185 (1887); Ryan v. McGehee, 83 N. C. 500 (1880); Springs v. Harven, 56 N. C. (3 Jones' Eq.) 97 (1856); Williams v. Burnett, 45 N. C. (Busbee's Eq.) 209 (1853).

Deeds reformed to reserve a life estate where such was intended: Clemmons v. Drew, 55 N. C. (2 Jones' Eq.) 314 (1856).

To convert a fee simple into a life estate with remainder in another: Condor v. Secrest, 149 N. C. 201, 62 S. E. 921 (1908).

To include a reservation of timber rights to another: Sills v. Ford, 171 N. C. 733, 88 S. E. 636 (1916).

To convert a fee simple into an estate by entirety: Lewis v. Pate, 208 N. C. 512, 181 S. E. 623 (1935); Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32 (1923).

To convert an estate by entirety into one in common: Highsmith v. Page, 158 N. C. 226, 73 S. E. 998 (1912). See also Moore v. Greenville Banking & Trust Co., 178 N. C. 118, 100 S. E. 269, 273 (1919).

To restrict the amount of land expressed on the face of the deed: Maxwell v. Wayne National Bank, 175 N. C. 180, 95 S. E. 147 (1918); Pelletier v. Cooperage Co., 158 N. C. 403, 74 S. E. 112 (1912); Griffin v. Lumber Co., 140 N. C. 514, 53 S. E. 307 (1906); King v. Hobbs, 139 N. C. 170, 51 S. E. 911 (1905); Finishing and Warehouse Co. v. Ozment, 132 N. C. 839, 44 S. E. 681 (1903); Pugh v. Brittain, 17 N. C. (2 Dev. Eq.) 34 (1831); Newsom v. Bufferlow, 16 N. C. (1 Dev. Eq.) 379 (1830).

To increase the amount of land so expressed: Elias v. Arthur, 186 N. C. 756, 120 S. E. 588 (1923); Davis v. Ely, 104 N. C. 16, 10 S. E. 138 (1889).

To nullify restrictions in a deed: Pinchback v. Mining Co., 137 N. C. 171, 49 S. E. 106 (1904).

To include a condition subsequent: Martin v. Martin, 205 N. C. 157, 170 S. E. 651 (1933).

To change the consideration expressed on the face of the deed (expressed consideration of $500 reformed so as to read $3,000): Gillis v. Arringdale, 135 N. C. 295, 47 S. E. 429 (1904) (phrase, "due by bond or note" stricken) Morisey v. Swinson, 104 N. C. 555, 10 S. E. 754 (1890); (consideration in lease) Henry v. Smith, 76 N. C. 311 (1877); (addition of phrase, "payable in good current bank money") Womack v. Eacker, 62 N. C. (Phillip's Eq.) 161 (1867); (word "dollars" added) Huffman v. Fry, 58 N. C. (5 Jones' Eq.) 415 (1860).

To append a seal to a deed: McCown v. Sims, 69 N. C. 159 (1873).

To strike a seal erroneously appended: Lyman v. Califer, 64 N. C. 572 (1870).

To include in the habendum or premises of a mortgage a reference to a prior unrecorded mortgage which was by mistake included only in the warranty: Gray v. Newborn, 194 N. C. 348, 139 S. E. 695 (1927).

To strike from a deed a provision that the grantee assumed payment of a debt secured by a mortgage on the premises conveyed: Fire Ins. Co. of Virginia v. Edgerton, 206 N. C. 402, 174 S. E. 96 (1934).

Other Writings Relating to Real Property

An option to purchase land reformed into a contract to convey: Torrey v. McFayden, 165 N. C. 237, 81 S. E. 296 (1914).

A memorandum purporting to transfer title reformed into a deed: Johnson v. Lee and Crawley, 45 N. C. (Bus. Eq.) 43 (1852).

A lease reformed to express the true consideration: Gillis v. Arringdale, 135 N. C. 295, 47 S. E. 429 (1904).

Insurance Policies

See Williams v. Greensboro Fire Ins. Co., 209 N. C. 765, 185 S. E. 21 (1936); Britton v. Metropolitan Life Ins. Co., 165 N. C. 149, 80 S. E. 1072 (1914); McIntosh v. North State Fire Ins. Co., 152 N. C. 50, 67 S. E. 45 (1910); Sykes v. Ins. Co. of Virginia, 148 N. C. 13, 61 S. E. 610 (1908); Floars v. Aetna Life Ins. Co., 144 N. C. 232, 56 S. E. 915 (1907).

Other Executory Contracts

Appeal bond: Burnett v. Nicholson, 86 N. C. 728 (1882). See also McMinn v. Patton, 92 N. C. 371 (1885); Huson's Administrators v. Pitman, 3 N. C. (2 Hay) 331 (1804).

Indorsement on promissory note: McRae v. Fox, 185 N. C. 343, 117 S. E. 396 (1923).

Bill of sale of personal property: Robinson v. Benton, 201 N. C. 712, 161 S. E. 208 (1931); American Potato Co. v. Jennette Bros. Co., 174 N. C. 236, 93 S. E. 795 (1917).